

\ IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

WILLIAM C. KELLEY v. STATE OF TENNESSEE

**Appeal from the Circuit Court for Giles County
No. 1914-1917 Robert L. Jones, Judge**

No. M2005-01698-CCA-R3-CO - Filed June 29, 2006

The Petitioner, William C. Kelley, appeals the trial court's dismissal of his motion to correct error in record. The State has filed a motion requesting that this Court affirm the trial court's denial of relief pursuant to Rule 20, Rules of the Court of Criminal Appeals. We find the State's motion has merit. Accordingly, the motion is granted and the appeal is affirmed pursuant to Rule 20, Rules of the Court of Criminal Appeals.

**Tenn. R. App. P. 3; Judgment of the Trial Court Affirmed Pursuant to Rule 20, Rules of
the Court of Criminal Appeals**

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which DAVID H. WELLES, and JERRY L. SMITH, JJ, joined.

William C. Kelley, pro se, Clifton, Tennessee.

Paul G. Summers, Attorney General and Reporter; Sophia S. Lee, Assistant Attorney General, for the appellee, State of Tennessee.

MEMORANDUM OPINION

On October 9, 1982, a Giles County jury convicted Petitioner of three counts of first degree murder and one count of assault with intent to commit murder. The Petitioner was sentenced to three terms of life imprisonment on the first degree murder convictions and twenty-five years on the assault with intent to commit murder conviction. On November 6, 1982, the Petitioner filed a motion for new trial claiming that the court erred in ordering the Petitioner's sentences to run consecutively rather than concurrently. On November 23, 1982, after a hearing on the motion for new trial, the trial court found that the sentences should run consecutively and entered an order for all sentences to run consecutively. This Court affirmed the Petitioner's convictions and sentences on September 24, 1984, stating, "[Petitioner and co-defendant] were sentenced to three terms of life imprisonment on the murder convictions and twenty-five years on the assault conviction. The sentences are to be served consecutively." State v. Kelley, 683 S.W.2d 1, 2 (Tenn. Crim. App. 1984).

On March 2, 1998, the Petitioner filed a petition for post-conviction relief which the trial court denied. The Petitioner appealed that decision, and on April 4, 2001, this court affirmed the trial court's denial of post-conviction relief. Kelley v. State, No. M2000-01881-CCA-R3-PC, 2001 WL 366395, at *1 (Tenn. Crim. App., at Nashville, April 4, 2001), *perm. app. denied* (Tenn. Sept. 17, 2001).

The Tennessee Department of Correction sent the Petitioner an offender sentence letter dated October 8, 2004, showing the Petitioner's sentences running consecutively. While the record is limited, it appears the Tennessee Department of Correction had previously, incorrectly recorded the Petitioner's sentences as running concurrently and sent the sentencing letter to reflect a correction of the Tennessee Department of Correction records. On June 6, 2005, the Petitioner filed a pro se motion to correct error in record. On June 10, 2005, the trial court dismissed the Petitioner's motion. On June 17, 2005, the Petitioner filed a notice of appeal.

Rule 3(b) of the Tennessee Rules of Appellate Procedure governs the circumstances in which a defendant has an appeal as of right. Rule 3(b) reads:

In criminal actions an appeal as of right by a defendant lies from any judgment of conviction entered by a trial court from which an appeal lies to the Supreme Court or Court of Criminal Appeals: (1) on a plea of not guilty; and (2) on a plea of guilty or nolo contendere, [if certain specified circumstances exist]. The defendant may also appeal as of right from an order denying or revoking probation, and from a final judgment in a criminal contempt, habeas corpus, extradition, or post-conviction proceeding.

Tenn. R. App. P. 3(b). The judgment at issue in this case is not “[a] judgment of conviction . . . an order denying or revoking probation, [or] a final judgment in a criminal contempt, habeas corpus, extradition, or post-conviction proceeding.” Thus, the trial court's judgment dismissing the Petitioner's motion is not covered by Rule 3, and the Petitioner does not have an appeal as of right.

Accordingly, the State's motion is granted. The judgment of the trial court is affirmed in accordance with Rule 20, Rules of the Court of Criminal Appeals. Since the record reflects that the petitioner is indigent, costs are taxed to the State.

ROBERT W. WEDEMEYER, JUDGE